No. 15,135

IN THE

United States Court of Appeals

For the Ninth Circuit

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska, et al.,

Appellees.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Plaintiff appeals from an order of the Trial Court granting a judgment on motion of defendants to dismiss plaintiff's complaint.

JURISDICTIONAL STATEMENT.

This is a taxpayer's suit in equity to restrain the Treasurer and other officials of the Territory of Alaska from making unlawful and unconstitutional expenditures of territorial funds and from carrying into effect a territorial statute compelling plaintiff

and other taxpayers to support non-public school transportation. (Tr. 3-4.)

Plaintiff is a citizen, resident taxpayer of the Territory of Alaska and sues on behalf of himself and all citizen, resident taxpayers of the territory similarly situated. (Tr. 4-5.) He challenges the validity of Chapter 39 of the Session Laws of Alaska of 1955 (Regular Session) which provides (Tr. 5-6):

> "An Act to promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws.
>
> "Be It Enacted by the Legislature of the Territory of Alaska:
>
> "Section 1. The Legislature recognizes these facts:
>
> "(a) The attendance at schools for all children between the ages of seven and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.
>
> "(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.
>
> "Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted.
>
> "Section 2. In those places in Alaska where transportation is provided under Section 37-2-8 ACLA 1949 for children attending public schools,

transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools which are administered in compliance with Sections 37-11-1, 37-11-2 and 37-11-3 ACLA 1949, where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

"Section 3. This Act shall be administered by the Commissioner of Education under the direction and supervision of the Territorial Board of Education, and the total cost of all such transportation shall be paid from funds appropriated for that purpose by the Legislature."

Plaintiffs also challenges so much of Chapter 6 of the Extraordinary Session Laws of Alaska of 1955 as makes a $1,250,000.00 school transportation appropriation available in part for transportation of pupils to and from non-public schools. (Tr. 6-7.)

Plaintiff alleges that the foregoing statutes, authorizing and appropriating in part public money for non-public purposes, namely, non-public school transportation, are void and in excess of the power of the Alaskan Legislature in each of the following respects (Tr. 8-11):

(a) They contravene the express limitations of the Organic Act of Alaska, 48 USCA Sec. 77, which provides (Tr. 9):

"* * * nor shall any public money be appropriated by the territory or any municipal corporation therein for the support or benefit of any

sectarian, denominational or private school, or any school not under the exclusive control of the Government * * *"

(b) They violate the First, Fifth, and Fourteenth Amendments to the United States Constitution, and the Civil Rights Act, 42 USCA Secs. 1981-1983, made applicable to the Territory by 48 USCA Sec. 43, in that they appropriate public money for, grant preferences to, aid, and support sectarian education, thereby constituting laws respecting an establishment of religion and depriving plaintiff and other taxpayers of their property for an unconstitutional purpose.

(c) They violate the Fourteenth Amendment to the United States Constitution, the Civil Rights Act, and 48 USCA Sec. 77 in that there is denied to plaintiff and other taxpayers the equal protection of the laws, and they are class legislation, and they are not uniform in operation since the defendants will necessarily enforce said legislation, by reason of its wording, in a grossly disproportionate manner by expending public money for the transportation of children to the schools of one particular sect of which plaintiff is not a member, which sect will receive a grossly disproportionate benefit therefrom in terms of both the pupils and schools accommodated.

The District Court had jurisdiction under 48 U.S.C., Sec. 101 pursuant to its general equity jurisdiction and also under 28 U.S.C., Sec. 1343 since this is a suit to restrain the deprivation of constitutional rights under color of territorial law.

This Court has jurisdiction under 28 U.S.C., Sec. 1291 to review the judgment of the United States District Court of Alaska, dismissing the complaint and allowing defendant $250.00 for attorney fees.

STATEMENT OF THE CASE.

The plaintiff, Woodrow W. Reynolds, brought suit on behalf of himself and all taxpayers similarly situated against defendants Hugh Wade, as Treasurer of the Territory of Alaska; John McKinney, as Director of Finance of the Territory of Alaska; Don M. Dafoe, as Commissioner of Education of Alaska; and A. H. Ziegler, William Whitehead, Mrs. James March, Mrs. Myra Rank and Robert F. Baldwin, as Members of the Board of Education of the Territory of Alaska. (Tr. 3, 7-8, 12.)

He alleged in his complaint that at all times mentioned he has been and is the owner of real and personal property located in the Juneau-Douglas Independent School District and in the Territory of Alaska, and a citizen, resident, taxpayer thereof; and assessed for and liable to pay taxes to the Territory of Alaska as provided by law; and within one year prior to the commencement of the action has paid a Territorial Income Tax, a resident fisherman's license tax, an automobile license tax, a $7.50 school tax and a hunting license to the Territory of Alaska. (Tr. 4.)

Plaintiff next alleged that the citizen, resident taxpayers of the Territory number many thousands; that plaintiff and these taxpayers are in the same class,

affected by all the matters alleged, and subject to like injury and damage; that there are common questions of law and fact affecting their rights, and a common relief is sought; that these persons united in interest with plaintiff are too numerous to make it practical to bring them before the court; and that plaintiff therefore not only sues on his own behalf, but also on behalf of "each and all the said citizens and residents and taxpayers of said school district and Territory." (Tr. 4-5.)

Plaintiff next set forth verbatim the language of Chapter 39 of the Session Laws of Alaska of 1955 (Regular Session), which we previously quoted and which authorizes appropriations from territorial funds for non-public school transportation. (Tr. 5-6.)

In the following paragraph, plaintiff alleged that:

> "5. The Legislature of said Territory, by Chapter 6 of the Session Laws of Alaska of 1955 (Extraordinary Session) enacted a general appropriation bill appropriating out of monies in the General Fund of said Territory the sum of $1,250,000.00 for 'transportation to schools,' part of which sum of $1,250,000.00 was, and is by said Legislature intended to be made available during the school biennium beginning July 1, 1955, and ending June 30, 1957, for the transportation to non-public schools of pupils coming within the provisions of the aforesaid Chapter 39 SLA 1955." (Tr. 8.)

He then alleged that plaintiff and said taxpayers of the Territory will be forced to pay the funds so

appropriated from the regular and special taxes (Tr. 7); that the various defendants are charged by law with administering and supervising the said transportation program, as well as with drawing warrants and disbursing territorial monies for charges against said Territory and for which appropriations have been made (Tr. 7-8); and that by virtue of the said statutory provisions, the defendant territorial officials will, unless enjoined, expend from the Territorial Treasury during the school biennium commencing July 1, 1955 and ending June 30, 1957, a substantial portion of the said $1,250,000.00 for transportation of pupils to non-public, including sectarian and denominational schools, which funds will come from the Territorial Treasury and thereby greatly increase the taxes of plaintiff and other territorial taxpayers. (Tr. 8).

In the following paragraph, plaintiff alleged that the statutes are void and in excess of the power of the Territorial Legislature and that the expenditures are for an unconstitutional purpose in each of the following particulars (Tr. 8-11):

> "(a) Said purported legislation contravenes the limitations of the Organic Act of said territory, to wit, Section 77 of Title 48 of the United States Code, which provides, in part, as follows:
>
> "'* * * nor shall any public money be appropriated by the territory or any municipal corporation therein for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government * * *'

"in that said legislation appropriates public money for the transportation of pupils to sectarian and denominational schools, thereby facilitating attendance at such schools, saving such schools the expense of themselves providing transportation for pupils, and releasing for other school purposes funds which would otherwise be employed by the schools for such transportation; and said legislation thereby materially supports and substantially benefits such schools.

"(b) Said purported legislation and expenditures violate the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act (Sections 1981, 1982, and 1983 of Title 42 of the United States Code) all made applicable to said Territory by Section 23 of Title 48 of the United States Code, in that said legislation appropriates public monies for and provides for the transportation of pupils to sectarian and denominational schools conducted not merely for educational purposes but also for the purpose of indoctrinating children in the particular dogma of the religious sect which conducts the schools. Said legislation thereby grants preferences to and aids and supports sectarian and denominational education and constitutes a law respecting an establishment of religion. Said legislation also thereby compels plaintiff and other taxpayers similarly situated to be taxed for the support and aid and assistance of, and indirectly to contribute money for the propagation of sectarian and denominational dogma and which they disbelieve, and therefore deprives plaintiff and said other taxpayers of their property without due process of law by

compelling them to pay taxes for and to contribute money for an unconstitutional purpose, to wit, the support and aid and assistance of a religious establishment.

"(c) Said legislation violates the Fourteenth Amendment to the United States Constitution and the said Civil Rights Act, made applicable to said territory as aforesaid, and contravenes the limitations of the Organic Act of said Territory, to wit, Section 77 of Title 48 of the United States Code, in that there is denied to plaintiff and the other taxpayers similarly situated the equal protection of the laws, and it is class legislation, and it is not uniform in operation, to wit, in that defendants will necessarily enforce said legislation by reason of its wording in a grossly disproportionate manner so as to constitute a deliberate and intentional discrimination against plaintiff and said other taxpayers by expending public money thereunder for the transportation of children to the schools of one particular sect of which plaintiff is not a member, which sect will, by comparison with the benefits received by other non-public schools, receive a grossly disproportionate benefit therefrom in terms of both the pupils and schools accommodated."

Plaintiff concluded by alleging that he has no plain, speedy or adequate remedy at law and that the acts and intentions of defendants by enforcing and implementing said Legislation and by paying out public money for the transportation of pupils to sectarian and denominational schools will take property and property rights from plaintiff and said taxpayers and cause them irreparable loss. (Tr. 11.) Plaintiff

then prayed that the legislation be declared void, that the defendants be enjoined from carrying it into effect or from paying out territorial money or contracting for such transportation at public expense, and that plaintiff be awarded costs of suit. (Tr. 11-12.)

The gist of the foregoing allegations is a suit in equity by a territorial taxpayer to prevent the use of tax derived territorial funds for non-public purposes, namely, sectarian educational purposes—a use forbidden in express and detailed terms by the Organic Act of Alaska and also by the Federal Constitution.

The defendants moved the District Court for an order dismissing the complaint (Tr. 13) on the grounds that:

(a) It fails to state a claim against the defendants upon which relief can be granted and

(b) It does not allege that the plaintiff will suffer any injury that will not be suffered in common by the general public.

In ruling on defendant's motion to dismiss, the District Court filed an opinion which concedes that municipal and county taxpayers have universally been permitted to sue in equity to restrain an unlawful expenditure of city or county funds. (Tr. 19-20.) The Court also concedes that the great majority of Courts have upheld the right of state taxpayers to sue for an injunction against an unlawful expenditure of *state* funds. (Tr. 20.) *Finally, the Court below admitted that the right of a territorial taxpayer to sue in respect of territorial funds has been upheld in respect*

of the territories of Hawaii and Puerto Rico. (Tr. 20.) Yet it concluded that the Court of Appeals for the Ninth Circuit has ruled against such a right in respect of the Territory of Alaska. Relying on *Massachusetts v. Mellon,* 262 U.S. 447, and *Sheldon v. Griffin,* 174 F. 2d 382 (9th Cir., 1949), the District Court granted defendants' motion for dismissal. (Tr. 20-23.)

Subsequent to the filing of its opinion, the Court undertook to decide and rendered an additional opinion determining that attorneys' fees were properly allowable as costs to defendants as the prevailing parties even though they were represented by the Attorney General of Alaska. (Tr. 29-35.)

The Court then rendered judgment dismissing plaintiff's complaint and ordering that defendant (sic) recover attorneys fees in the amount of $250.00. (Tr. 24-25.) Plaintiff prosecutes this appeal from that judgment. (Tr. 26.)

QUESTIONS PRESENTED.

1. Whether plaintiff, as a taxpayer of the Territory of Alaska and those similarly situated, may sue through plaintiff to restrain territorial officials from making an unlawful or unconstitutional expenditure of territorial funds derived from taxes.

2. Whether attorneys' fees are properly allowable as costs to defendants as prevailing parties where they are represented by the Attorney General of the Territory but have paid him nothing for his services.

3. Whether plaintiff's complaint states a cause of action for injunctive relief against territorial officials by reason of their proposed expenditure of territorial funds for non-public school transportation, including to and from sectarian schools.

SPECIFICATION OF ERRORS.

1. The District Court erred in dismissing the complaint herein.

2. The District Court erred in ordering that a defendant recover attorneys' fees in the amount of $250.00, or in any amount.

3. The District Court erred in entering judgment for defendants, dismissing the complaint and ordering that a defendant recover attorneys' fees.

4. The District Court erred in finding and concluding that the complaint does not allege that the plaintiff and those similarly situated will suffer an injury that will not be suffered in common by the general public.

5. The District Court erred in finding and concluding that a plaintiff who alleges that he and those similarly situated are taxpayers of the Territory of Alaska and that territorial officials are about to make an unlawful and unconstitutional expenditure of territorial funds alleges no injury different from that of the general public, and makes no sufficient

showing as to a right to maintain the action, and suffers no direct or special injury entitling suit.

6. The District Court erred in not finding that plaintiff alleged a direct and special injury entitling him and those similarly situated to sue, and alleged an injury different from that of the general public, and made a sufficient showing of a right to maintain the action.

7. The District Court erred in finding and concluding that the action presents no justiciable controversy.

8. The District Court erred in concluding that it is the law of the Ninth Circuit that a plaintiff who alleges he and those similarly situated are territorial taxpayers and that tax-derived territorial funds are about to be unlawfully expended makes no showing sufficient to allow said taxpayers through him to sue in equity to restrain such an unlawful expenditure of territorial funds.

9. The District Court erred in not applying the rule of the First Circuit and the courts of Hawaii that a territorial taxpayer may sue to enjoin an unlawful expenditure of territorial funds.

10. The District Court erred in concluding that it was unnecessary to pass upon the question of contravention of the Organic Act or Constitutional prohibitions raised by plaintiff.

11. The District Court erred in not finding that plaintiff and those similarly situated had alleged a

claim for relief on the grounds that an unlawful expenditure of territorial funds is involved.

ARGUMENT.

I. PLAINTIFF'S ALLEGATIONS CLEARLY ESTABLISH A JUSTICIABLE CONTROVERSY AND SHOW HIS RIGHT TO MAINTAIN THIS ACTION ON BEHALF OF HIMSELF AND THOSE SIMILARLY SITUATED. THE JUDGMENT OF DISMISSAL SHOULD THEREFORE BE REVERSED.

The real question here is whether plaintiff and those similarly situated have sufficiently shown a standing to sue when plaintiff alleges that they are territorial taxpayers who have directly contributed through territorial taxes to a fund which is about to be expended for a purpose expressly forbidden by the Organic Act and the Federal Constitution. We say the authorities are clear that they have. We also say that the Alaska District Court has twice in the last year misapplied the rule of *Massachusetts v. Mellon*, 262 U.S. 447, applicable only to United States taxpayers and congressional appropriations and has likewise misinterpreted the law of this Circuit as set forth in *Sheldon v. Griffin*, 174 F. 2d 382.

A. Plaintiff has shown that a direct and substantial pecuniary injury will result to himself and other territorial taxpayers similarly situated if the unconstitutional expenditures are allowed since the funds are derived directly from territorial taxes paid by plaintiff and said other taxpayers.

Plaintiff alleged that he and those similarly situated are citizen, resident, taxpayers of the Territory

of Alaska; and assessed for and liable to pay taxes to the Territory; and actually have paid territorial income taxes, school taxes, and license taxes. (Tr. 4.) He showed that the non-public school transportation expenses will be paid from funds appropriated for that purpose by the Legislature. (Tr. 6.) He showed that the Legislature has actually appropriated monies from the General Fund of the Territory for non-public school transportation, including sectarian schools. (Tr. 6-7.) He showed that the defendants intend to expend such appropriated funds for said non-public school transportation. (Tr. 7-8.) And, *plaintiff specifically alleged that these appropriated funds which will be so expended were obtained in part from the regular and special taxes paid by and required to be paid to said Territory by plaintiff and those similarly situated.* (Tr. 7.) He also pointed out that *such funds will thereby be lost from the Territorial Treasury and* that the *payment thereof will greatly increase said taxpayers' taxes.* (Tr. 8.)

In short, we are not merely dealing with a member of the general public; nor are we dealing with someone only remotely affected by the expenditure of territorial funds; nor are we merely dealing with territorial funds which are contributed by and held for a limited group of taxpayers or private individuals. We are dealing with the general fund of Alaska, derived directly from taxes paid by plaintiff and those similarly situated and being expended for a purpose forbidden by the Organic Act.

Plaintiff's interest and that of those for whom he speaks is not an etherial one based on convictions alone. He and they are taxpayers. They are compelled to supply the funds that have been illegally appropriated and will be wrongfully spent. Moreover their interest is not infinitesimal like that of a U. S. taxpayer who challenges a congressional appropriation. The population of the Territory of Alaska is less than 130,000 by the last official U. S. census. Thus the direct pecuniary interest of plaintiff and those similarly situated in and direct pecuniary loss from an unconstitutional expenditure of public funds is far, far greater than that of the taxpayers in hundreds of cities and counties who have universally been allowed to maintain taxpayer suits. It is 23 times greater than that of a Puerto Rican taxpayer and 5 times greater than that of a Hawaiian taxpayer—both of whom have been allowed to maintain taxpayer suits. It is over a hundred times greater than that of a taxpayer in many of the states which have ruled that a state taxpayer has a direct, pecuniary interest sufficient to entitle him to sue. Lastly, it is certainly no less than that of a stockholder in many of the large corporations whose stockholders have always been held to have sufficient interest to bring a suit to prevent waste of corporate funds.

It is therefore safe to say that, aside from direct authority and compelling policy reasons for allowing plaintiff and those similarly situated to bring this suit, there is ample showing of a direct, immediate, and substantial pecuniary loss resulting from an expen-

diture of the territorial funds to which they contribute.

B. There is strong and persuasive authority, directly in point, allowing territorial taxpayer suits in a case like this. Thus the Courts have allowed both Puerto Rican and Hawaiian taxpayers to bring suits against territorial officials.

The decision of the Circuit Court of Appeals for the First Circuit, in *Buscaglia v. District Court of San Juan,* 145 Fed. 2d 274, (1st Cir., 1944), *Cer. Den.* 65 Sup. Ct. 434, 323 U.S. 793, is directly in point. This case involved a suit by a Puerto Rican taxpayer against the Treasurer of Puerto Rico and others, to enjoin them from making any further allocation of insular funds for emergency relief purposes, on the ground that no valid legislative appropriation existed therefor. From an order of the Supreme Court of Puerto Rico RESTORING A RESTRAINING ORDER ISSUED BY THE DISTRICT COURT OF SAN JUAN, the defendants and intervenors appealed. The Circuit Court of Appeals for the First Circuit affirmed. Among other points on appeal the defendants raised the following:

> Does the plaintiff taxpayer Miro have some special interest of such nature as to qualify him to bring the proceedings for injunction, for which he has applied in the present case?

In considering this question on appeal, the Circuit Court of Appeals for the First Circuit said (145 F. 2d 283):

> "The three judges of the Supreme Court of Puerto Rico who sat on this case agreed that this

question is of a local nature. They disagreed, however, as to its answer. A majority of them, noting that the authorities were UNANIMOUS TO THE EFFECT THAT A MUNICIPAL TAXPAYER has standing to enjoin the illegal use of MUNICIPAL funds, that a FEDERAL TAXPAYER has no standing to do the same with respect to federal funds (*Commonwealth of Massachusetts v. Mellon,* 262 U. S. 447, 43 Sup. Ct. 597), and that there was a split in the authorities where state funds were concerned, were 'inclined to accept as more reasonable the rule LAID DOWN BY THE MAJORITY OF THE STATE JURISDICTIONS, which recognizes the right of the taxpayer to appear in a court of equity to stop the use, without prior legislative authorization therefor, of STATE FUNDS by executive officers of the state.' The majority then went on to say:

" 'The recognition of that right is needed more in Puerto Rico than in state communities. In the latter, the executive chief or the chiefs of departments, if they act ultra vires or without authorization from the Legislature, and make illegal use of public funds, may be submitted to an "impeachment" proceeding and punished for their illegal act. IF in Puerto Rico, the legislature of which lacks authority to bring "impeachment" proceedings and whose high executive officers do not derive their authority and power from the consent of the governed, WE ADOPTED THE RULE FOLLOWED BY A MINORITY OF THE STATE JURISDICTIONS AND IGNORED THE FACT THAT THE MODERN TENDENCY IS IN THE DIRECTION OF ACKNOWLEDGING THE RIGHT OF THE

TAXPAYER TO SUE THOSE WHO MAKE ILLEGAL USE OF PUBLIC FUNDS, we would have to admit that in this jurisdiction the illegal act of making unauthorized use of public funds could be committed without there existing an efficient remedy to avoid or punish the same. We would have to confess that in Puerto Rico the legal maxim ubi jus, ibi remedium has no meaning.'

"The court below therefore held 'that petitioner taxpayer HAS THE NECESSARY STANDING AND INTEREST TO BRING THIS INJUNCTION PROCEEDING.' We are asked to reverse this holding on two grounds:

"First because it is patently erroneous, and second because the question is not a local but a federal one controlled by the decision of the Supreme Court in *Commonwealth of Massachusetts v. Mellon,* supra. WE DO NOT AGREE.

"If the question be one of local law we certainly cannot say that the Supreme Court of Puerto Rico fell into manifest error in ADOPTING THE RULE OF A MAJORITY OF THE HIGHEST STATE COURTS FOR THE REASON THAT THAT RULE WAS NOT ONLY SUPPORTED BY THE BETTER REASON BUT ALSO WAS PECULIARLY APPROPRIATE TO PUERTO RICO. The arguments rather half-heartedly advanced by the defendants in support of reversal on this ground are not of sufficient importance to warrant discussion.

"Their arguments in support of their second ground for reversal on this point cannot, however, be disposed of so summarily. In essence they say that in *Commonwealth of Massachusetts*

v. Mellon the Supreme Court of the United States decided that the constitutional doctrine of separation of powers prevents the courts from interfering at the behest of taxpayers with the action of executive officials, that the doctrine of separation of powers, as a matter of federal law, applies in Puerto Rico, and hence that the Supreme Court of Puerto Rico was not free to select its own rule and erred in refusing to follow the rule established in the case last cited (*Commonwealth of Massachusetts v. Mellon,* supra).

"We concede that the doctrine of separation of powers is implicit in the Organic Act of Puerto Rico as it is in the Philippine Organic Act . . . but we do not concede the rest of the defendants' argument . . .

"The language of the court in *Commonwealth of Massachusetts v. Mellon* was directed to a case involving the relation of an individual taxpayer to the FEDERAL GOVERNMENT. The interest of such an individual, as affected by an alleged illegal expenditure of FEDERAL FUNDS, was regarded as so minute, indeterminable, and remote, as not to present any substantial case or controversy in the constitutional sense between the plaintiff and the Secretary of the Treasury. BUT THE RELATION OF A TAXPAYER TO THE GOVERNMENT OF PUERTO RICO IS, AS A MATTER OF DEGREE, NOT SO ATTENUATED; and despite any purely logical arguments which might be made from some of the language in *Commonwealth of Massachusetts v. Mellon,* WE HAVE NO DOUBT THAT IT IS WITHIN THE COMPETENCE OF THE TERRITORIAL GOVERNMENT, EITHER

BY LEGISLATIVE ACT OR JUDICIAL DECISION, TO AUTHORIZE A TAXPAYER'S BILL IN EQUITY IN A CASE LIKE THE PRESENT WITHOUT TRENCHING UPON THE DOCTRINE OF SEPARATION OF POWERS IMPLICIT IN THE ORGANIC ACT." (Emphasis supplied.)

Equally in point are three Hawaiian cases.

First, in *Lucas v. American Hawaiian E. & C. Co.,* 16 Hawaii 80, plaintiff, a citizen and taxpayer of the Territory of Hawaii, brought suit against the Territorial Superintendent of Public Works, the Territorial Auditor, and others to restrain any expenditure of public funds for an allegedly illegal contract. The Circuit Judge of the First Circuit issued a perpetual injunction; and the Hawaiian Supreme Court affirmed the judgment on appeal, stating at 16 Hawaii page 86:

> "It is next contended that the plaintiff has no right as a taxpayer to maintain this suit. The right of a taxpayer to bring suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction since the case of *Castle, et al. v. Kapena,* 5 Haw. 27 (1883). If the question could be considered an open one we should follow the rule laid down in *Crampton v. Zabriske,* 101 U. S. 601, and in *R. P. R. R. Co. v. Hall,* 91 U. S. 343, cited in *Castle v. Kapena.* It is not necessary that the plaintiff should show actual damage to himself and to all others similarly situated, as is contended by the Assistant Attorney General. The cause of action is the alleged improper awarding of a contract, after a call for tenders based on indefinite specifica-

tions. If there has been a violation or evasion of the law requiring the awarding of the contract to the lowest bidder, after a public advertisement for tenders, damage is presumed to result to all taxpayers. The object of the suit is to prevent the violation of the law. The consequences which may result in case the law is disregarded are so obvious that no proof of actual pecuniary damage is necessary. In *Crampton v. Zabriske* the court on page 609 says: '* * * From the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of the corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individaul taxpayers should not be entertained to prevent the misuse of corporate power.' The plaintiff comes within the rule, and no further showing as to damages is necessary under the facts in this case."

Again in *Castle v. Secretary of Hawaii,* 16 Hawaii 769, plaintiff sued as a taxpayer of the Territory of Hawaii to restrain the Secretary of the Territory from expending any money for a special election under authority of a statute which he said violated the Organic Act and other constitutional provisions.

The Supreme Court again upheld the right of the taxpayer to sue, stating at 16 Hawaii pages 774 and 776-777:

> "That the remedy sought by the plaintiff is available to him in his capacity as a citizen and taxpayer appears to be within the rule in *Castle, et al. v. Kapena,* 5 Haw. 27. * * *
>
> "The *Kapena* case was expressly affirmed in *Lucas v. American-Hawaiian Engineering & Construction Co.,* ante, p. 86, in which the court used the following language:
>
> " 'The right of a taxpayer to bring suit to restrain a public officer from doing an illegal act has been settled in this jurisdiction since the case of *Castle, et al. v. Kapena,* 5 Haw. 27 (1883).'
>
> "We see no occasion to depart from this rule. The argument that a single taxpayer may not represent the wishes of the majority and that a question of public interest ought not to be adjudicated at his sole instance, with no opportunity for expression of opposing views, does not, in our opinion, affect his right to an adjudication. Any person, citizen or not, accused of an offense, may raise the question of the constitutionality of the law under which he is tried, and no one but himself and the prosecution is entitled to be heard upon it. Adjudicating the constitutionality of the act in advance of county organization avoids unnecessary expense and complication if the decision is adverse to the Act, and, if in its favor, furnishes desirable assurance of legal protection to those who shall be elected to county offices besides having burdensome and

expensive litigation in respect of matters so adjudicated.

"While equity has not jurisdiction to determine political rights but is confined to questions affecting rights of property, it appears to us that the case presented by the plaintiff in his capacity as a taxpayer comes within equitable jurisdiction for protection of property rights against acts of executive officers under unconstitutional statutes."

Finally, in the earlier case of *Castle v. Kapena,* 5 Hawaii 27, the Hawaiian Supreme Court denied a writ of mandamus to a plaintiff taxpayer but said that an *injunction* would lie to restrain territorial officials against the unlawful disbursement of funds or the illegal creation of a debt. The Court states at 5 Hawaii pages 34-35:

"It is said, for the respondent, that as the petitioners suffer no special and private injury, they cannot claim a standing in Court. There is authority for this position. Under some circumstances, it would be for the Attorney-General, or officer occupying an analogous position, to bring proceedings. In some cases, private parties, moving proceedings for mandamus or injunction, bring it in the name of the Attorney-General, and permission to do so is accorded as of course.

"*Merrill v. Plainfield,* 45 N. H. 126, may be cited as one of the cases supporting the right of individuals to bring action in a public matter; the Court saying that as the town by vote undertook to appropriate money in a manner unauthorized by law, any person who is a taxpayer in town, and liable to be assessed for any part

of such sum, may properly interfere to prevent its payment and misapplication, and granted a perpetual injunction.

"The principal objection to permitting suits to be brought by private taxpayers, is said to be the annoyance to public officers by a multiplicity of suits. The answer to this, as well as the doctrine in such cases, is set forth in a recent case in the Supreme Court of the United States, *Crampton v. Zabriskie,* 101 U. S. Reports, heard in 1879. We quote the language of Mr. Justice Field at large:

" 'Of the right of resident taxpayers to invoke the interposition of a Court of Equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they, in common with other property holders of the county, may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State Courts in numerous cases, and from the nature of the powers exercised by municipal corporations, the great dangers of their abuse, and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for Courts of Equity to interfere, upon the application of taxpayers of a county, to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. The Courts may be safely trusted to prevent the abuse of their process in such cases.' "

* * * * * * *

"It is apparent that if there is to be a proceeding in the case at bar, it must be brought

by some other person than the Attorney-General. The Attorney-General is bound by the statute defining his office to appear in defense of actions brought against Government officers. He does so in this case, and the respondent herein acts under the direction of the King in Cabinet Council, of which the Attorney-General is a member."

C. In an analogous situation where a state taxpayer sues to enjoin the illegal or unconstitutional expenditure of state funds, the great weight of authority allows such suit—and for good and compelling reasons.

It is equally well established in the great majority of states today that a taxpayer and, through him, those similarly situated may sue to enjoin *state* officials against an unlawful expenditure of *state* funds. Thus the Court says in *Herr v. Rudolph,* 75 N.D. 91, 25 N.W. 2d 916 at 919:

> "At the threshold of the case we are met by the defendants' challenge to the right of the plaintiff to institute this action. They say he has no legal capacity to do so and especially none to ask that state officers be restrained from acting pursuant to statutory direction and authority. This court, however, has often held that where public funds are about to be unlawfully expended a taxpayer in his own behalf and on behalf of his fellow taxpayers may challenge the proposed expenditure and invoke the powers of equity to prevent the officers about to do so from making it. (Citing cases.) It is true that these cases do not involve the expenditure of state funds but we can see no reason why the fact that the instant case does should render the rule there applied inapplicable here. (Citing cases.) We

therefore hold that the defendants' challenge must be overruled. Thus it becomes necessary to examine into the merits of the case."

The following cases clearly demonstrate that the great weight of authority is in accord with the *Rudolph* case where state officials and an illegal expenditure of tax-derived state funds are involved. They show also that the interest of such taxpayers is special and distinct from that of the general public.

Fergus v. Russell, 270 Ill. 304, 110 N.E. 130;

Castilo v. State Highway Commission, 312 Mo. 244, 279 S.W. 673;

Hill v. Rae, 52 Mont. 378, 158 Pac. 826;

Conway v. New Hampshire Water Resources Board, 89 N.H. 346, 199 A. 83;

Horvitz v. Sours, 74 Ohio App. 467, 58 N.E. 2d 405;

Funk v. Mullan Contracting Co., 78 A. 2d 632 (Md. Ct. of Appeals);

Page v. King, 285 Pa. 153, 131 Atl. 707;

Leckenby v. Post Printing & Publishing Co., 65 Colo. 443, 176 Pac. 490;

Green v. Jones, 164 Ark. 118, 261 S.W. 43;

Midwest Popcorn Co. v. Johnson, 152 Neb. 867, 43 N.W. 2d 174;

Ellingham v. Dye, 178 Ind. 338, 99 N.E. 1;

Terrell v. Middleton, 187 S.W. 367 (Tex. Civ. (App.);

Carrier v. State Administrative Board, 225 Mich. 571, 196 N.W. 182;

Johnson v. Gibson, 240 Mich. 515, 215 N.W. 333;

Teer v. Jordan, 232 N.C. 48, 59 S.E. 2d 359;
Gaston v. State Highway Dept., 134 S.C. 402, 132 S.E. 680;
Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963;
Democrat Printing Co. v. Zimmerman, 245 Wis. 406, 14 N.W. 2d 428;
Lipinski v. Gould, 173 Minn. 559, 218 N.W. 123;
Martin v. Ingham, 38 Kan. 641, 17 Pac. 162;
Stewart v. Stanley, 199 La. 146, 5 So. 2d 531;
Evanhoff v. State Industrial Accident Comm., 78 Ore. 503, 154 Pac. 106;
Spriggs v. Clark, 45 Wyo. 62, 14 P. 2d 667;
Goode v. Tyler, 237 Ala. 106, 186 So. 129;
Lyon v. Bateman, 228 P. 2d 818 (Utah Sup. Ct.);
Lyn v. Polk, 8 Lea. 121;
Caine v. Robbins, 61 Nev. 416, 131 P. 2d 516;
Wentz v. Dawson, 149 Okla. 94, 299 Pac. 493;
Livermore v. Waite, 102 Cal. 113, 36 Pac. 424;
Aiken v. Armistead, 186 Ga. 368, 198 S.E. 237.

D. It scarcely seems necessary to confirm that city and county taxpayers have universally been allowed to sue. In fact the Ninth Circuit has expressly upheld such a suit by an Alaskan taxpayer.

In *Crampton v. Zabriskie,* 101 U. S. 601, 25 L. Ed. 1070, the United States Supreme Court states the fundamental and universal rule which allows taxpayers to sue in equity to restrain the unlawful expenditure of city and county funds. Following this rule, the Ninth Circuit Court of Appeals held, in *Valentine v. Robertson,* 300 Fed. 521, that a taxpayer

of the City of Juneau could sue in equity to restrain the city treasurer and others from the unlawful expenditure of public money.

E. The Ninth Circuit has never ruled against the standing of territorial taxpayers to seek an injunction against the unconstitutional expenditure of territorial funds. The Court below clearly misconstrued and misapplied the case of Sheldon v. Griffin. That case dealt only with a fund made up of employer contributions, fines, and penalties and with a statutory amendment which this Court expressly declared added nothing to the burden of territorial taxpayers. Moreover, this Court's ruling in Valentine v. Robertson clearly paves the way for its adoption of the rule of the First Circuit and the Hawaiian cases allowing territorial taxpayers to sue in a case like this.

The history of suits by Alaskan taxpayers to enjoin illegal appropriations is as follows:

In the case of *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924), the plaintiff sued as a taxpayer to enjoin the Treasurer of the City of Juneau from expending public funds appropriated by the city to defray the expenses of a lobbyist. The lower Court held that such payments were lawful and refused to grant an injunction. The Ninth Circuit Court of Appeals reversed the judgment and remanded the cause to the trial Court with instructions to grant the injunction prayed for. Squarely ruling on the Alaskan taxpayer's right to sue, the Court said at 300 Fed. 525:

> "The appellees deny the right of the appellant as a taxpayer to invoke the aid of a court of equity to restrain an unlawful expenditure of the money of the city. Opposed to their contention is the well-settled rule of the federal courts.

Crampton v. Zabriskie, 101 U. S. 601, 609, 25 L. Ed. 1070; *Mass. v. Mellon,* 262 U. S. 447, 486, 43 Sup. Ct. 597, 67 L. Ed. 1078; *Colorado Pav. Co. v. Murphy,* 78 Fed. 28, 23 C.C.A. 631, 37 L.R.A. 630. Likewise opposed to it is the almost universal rule of the Supreme Courts of the States, 19 R.C.L. 1163, and cases there cited."

Next, in the case of *Wickersham v. Smith,* 7 Alaska 522, the plaintiff Wickersham brought suit against the Treasurer of the Territory of Alaska to restrain him from paying out of the Territorial Treasury various sums of money which, he alleged, had been illegally appropriated by the Territorial Legislature. Plaintiff alleged that he was a taxpayer of the Territory, that the items complained of would be paid out of the Territorial Treasury by the defendant illegally, that the sums would thereby be lost from the public funds, and that their illegal payment would greatly increase the plaintiff's taxes. At the time of presenting his complaint, plaintiff moved for a temporary restraining order. The defendant interposed a demurrer, asserting that plaintiff had no capacity to sue and citing *Massachusetts v. Mellon,* 262 U.S. 487. After discussing certain of defendant's cases, the District Court drew an analogy between the status of a territory and that of a county—the territory depending for its existence upon the will of Congress in the one case and the county upon the will of the state legislature in the other, and neither being coequal in status with the courts. The Court then said that the point had not been argued and that it was unnecessary to pass upon it at that time. *But the*

District Court discussed the illegality aspects and granted the temporary injunction.

Next, in *Demmert v. Smith,* 82 F. 2d 950 (9th Cir., 1936), the plaintiff, as a taxpayer of the Territory of Alaska, sued to enjoin the Territorial Treasurer from disposing of certain public moneys appropriated by the Territorial Legislature for the benefit of the needy and indigent. Plaintiff alleged that the appropriations violated the equal protection clause by discriminating against Indian or Eskimo residents. A demurrer was interposed and sustained without leave to amend, and a judgment of dismissal was entered. On appeal, the Ninth Circuit Court of Appeals pointed out that plaintiff was neither an Eskimo nor an Indian and could only be affected as a taxpayer. The Court then went on to say that since the entire fund could be *properly and lawfully* expended if the unconstitutional portion were stricken, the plaintiff could not even claim injury as a taxpayer. The Circuit Court of Appeals, therefore, affirmed the lower Court and refused to consider the question of plaintiff's standing as a territorial taxpayer, saying at 82 F. 2d 952:

> "As to whether or not a taxpayer of Alaska, a Territory of the United States, can maintain a taxpayer's suit is a point that need not be decided in this case for reasons already pointed out and we refrain from expressing any opinion on that question."

The final case prior to 1955, and the only other case decided by the Court of Appeals, is *Sheldon v. Griffin,*

174 F. 2d 382 (9th Cir., 1949). There the plaintiff alleged that he was a citizen and taxpayer of Alaska and brought suit against the Executive Director and other members of the Unemployment Compensation Commission of Alaska. The plaintiff sought to prevent the Unemployment Compensation Commission from giving effect to a recent amendment of the Unemployment Compensation Code. The amendment provided for a system of credits to be granted qualified employers on an experience merit basis and also reduced the waiting period from two weeks to one week before benefits could be claimed by unemployed persons. Plaintiff challenged the validity of the amendment for asserted irregularities in the course of the bill's passage. The District Court found that the bill had not been given a third reading in the House as required by the Organic Act, and granted the injunctive relief prayed for. However, this Court reversed the judgment, saying:

> "In his complaint the plaintiff alleged merely that he is a citizen and taxpayer of Alaska. While he offered no proof on the subject we may assume that he occupies that status. THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA. The unemployment compensation FUND administered by the Commission IS MADE UP OF CONTRIBUTIONS EXACTED FROM EMPLOYERS in accordance with regulations prescribed by the Commission, plus fines and penalties collected pursuant to the provisions of the Act. Alaska Compiled Laws 1949, Section 51-5-5. There is nothing in the pleading or proof

> to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people." (Emphasis ours.)

The simple and clear holding of *Sheldon v. Griffin* is that the plaintiff—though alleging he was a taxpayer—*was not affected* AS A TAXPAYER. The funds in question were not derived from territorial taxpayers as such, but were collected from the employers alone. The Court of Appeals for the Ninth Circuit plainly says at 174 F. 2d 383:

> "THE AMENDMENT UNDER ATTACK ADDS NOTHING TO THE BURDEN OF THE TAXPAYERS OF ALASKA."

Hence its ruling that the taxpayer had suffered no injury entitling him to sue.

Our case is far different. Territorial funds collected from territorial taxpayers are involved. The statute here does add substantially to the burden of the taxpayers of Alaska. Plaintiff and those similarly situated do suffer injury AS TAXPAYERS.

Returning to the case of *Sheldon v. Griffin,* it must be observed that the Court of Appeals did not rule

upon a case like ours. Nor was it asked to. This is clear from the fact that the Court discussed no authorities involving the right of a taxpayer to enjoin illegal expenditure of territorial funds. Thus it did not discuss the case of *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir. 1944), *Cer. Den.* 65 S. Ct. 434, directly upholding such right. Nor did it discuss the Hawaiian cases, *Lucas v. American Hawaiian E. & C. Co.,* 16 Hawaii 80; *Castle v. Secretary of Hawaii,* 16 Hawaii 769; and *Castle v. Kapena,* 5 Hawaii 27, directly upholding such right. Nor did it discuss the ninth circuit cases we have analyzed above. The reason, of course, is that it did not have that kind of a case. No added burden to taxpayers was involved. No territorial, tax-derived fund was involved. And no territorial taxpayers were injured as such.

We, therefore, say unhesitatingly that as of this date, the Court of Appeals for the Ninth Circuit has never determined that territorial taxpayers may not sue to enjoin an illegal expenditure of territorial funds.

The District Court of Alaska erroneously concluded in *Shelton v. Wade,* 130 F. Supp. 212 (D. C. Alaska, 1955), and in our case that the point had been decided in this Circuit. But it should be noted that the District Court in *Shelton v. Wade,* supra, did not analyze the *facts* in *Sheldon v. Griffin,* 174 F. 2d 382. Nor did it discuss the fact that no tax-derived funds were involved in the *Sheldon* case. *Nor did it refer to the plain statement in the Sheldon case*

that the amendment there added nothing to the burden of the taxpayers of Alaska. Nor did it discuss taxpayer cases directly in point, such as *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924); *Buscaglia v. District Court of San Juan,* 145 F. 2d 274 (1st Cir., 1944), *Cer. Den.* 65 S. Ct. 434; and the Hawaiian cases. Finally, it *did not* discuss that the vast body of state authorities allowing suit by city, county and state taxpayers.

In our case, the District Court in its opinion conceded that Puerto Rican, Hawaiian and state taxpayers are allowed to sue. It nevertheless felt itself precluded by the case of *Sheldon v. Griffin,* supra, and assumed that the *Sheldon* case rested on the doctrine of separation of powers enunciated in *Massachusetts v. Mellon.* But the difficulty with the trial Court's erroneous assumption is that the Court of Appeals never once mentioned this factor in its decision of the *Sheldon* case. And it *did* specifically point out that the plaintiff there had suffered no injury as a taxpayer because no added tax burden was involved.

In short, it seems clear to us that the Court of Appeals in the *Sheldon* case cited *Massachusetts v. Mellon* for a particular point—to show that where there is no justiciable controversy, there can be no suit. And the Court of Appeals held that a taxpayer shows no justiciable controversy where no added tax burden is involved. The Court plainly states this point.

In conclusion, therefore, we emphasize (1) the clear holding in *Valentine v. Robertson,* 300 Fed. 521 (9th Cir., 1924). There the Court of Appeals for this circuit

unhesitatingly relied upon the many federal and state cases allowing municipal and county taxpayers to sue. (2) As we have demonstrated in preceding sections, the great majority of state courts have applied this same rule in allowing state taxpayers to sue in respect of state funds. (3) Finally, in four well-reasoned decisions, the Court of Appeals for the First Circuit and the Hawaiian Courts have applied the same rule to territorial taxpayers. (4) Moreover, as Judge Reed pointed out in *Wickersham v. Smith,* 7 Alaska 522, the situation in the Territories is more like that of counties. For, in the Territories, one deals with legislative bodies which exist at the will of Congress, are limited by the laws of Congress, and are not co-ordinate branches of government. And the federal courts should stand as guardians of the law—just as state courts stand as guardians of the law in respect of county and municipal governments which exist at the will of and are limited by state laws.

We have set forth above an analysis of the *Buscaglia* case decided by the First Circuit. We do urge a study of that decision for a thorough, timely, well-reasoned application to the Territories of the taxpayer doctrine. And we urge that this Court should follow the lead of its own decision in *Valentine v. Robertson,* 300 Fed. 521, and apply the well-reasoned decisions in the First Circuit and the Hawaiian Courts.

F. The lower Court has misapplied the rule of Massachusetts v. Mellon. We are not merely dealing with the infinitesimal relationship of a lone federal taxpayer to the Federal Treasury in respect of a nationwide appropriation. Our taxpayer plaintiff and those similarly situated for whom he speaks urge a case involving the relatively few residents of Alaska, the even smaller number of taxpayers there, and the direct and substantial addition to their tax burden caused by illegal expenditures. These taxpayers need judicial safeguards against violations of the organic law and of the Federal Constitution.

In the states, our city and county governments are limited in their actions by the state "organic act"—the constitution. They are limited as well by the prohibitions of the state legislature. And the state courts stand as guardians against any actions by city and county officials in violation of these organic and legislative prohibitions. This principle was well recognized by the United States Supreme Court in *Massachusetts v. Mellon,* when it said at 67 L. Ed. 1085:

> "The case last cited came here from the court of appeals of the District of Columbia, and that court sustained the right of the plaintiff to sue by treating the case as one directed against the District of Columbia, and therefore subject to the rule frequently stated by this court, that resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation. *Roberts v. Bradfield,* 12 App. D.C. 453, 459, 460. The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court."

In the *Mellon* case itself, however, the court was concerned with a taxpayer of the United States who was challenging a federal appropriation. He claimed his interest in the moneys of the U. S. Treasury was sufficient to entitle him to sue. The Supreme Court expressed concern that federal courts should not thus open the flood gates to millions of taxpayers who might challenge all sorts of federal appropriation statutes. Moreover, it called attention to the co-equal status under the Federal Constitution of the Executive Branch and the Supreme Court. These two considerations differentiated that case sharply from suits by city, county, and even state taxpayers. That was meat of the decision. The Supreme Court said at 67 L. Ed. 1085:

> "But the relation of a taxpayer of the United States to the Federal government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—IS SHARED WITH MILLIONS OF OTHERS; IS COMPARATIVELY MINUTE AND INDETERMINABLE; AND THE EFFECT UPON FUTURE TAXATION OF ANY PAYMENT OUT OF THE FUNDS SO REMOTE, FLUCTUATING and UNCERTAIN that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> "The administration of any statute likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public, and not of individual, concern. IF ONE TAXPAYER MAY

CHAMPION AND LITIGATE SUCH A CAUSE, THEN EVERY OTHER TAXPAYER MAY DO THE SAME, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. THE BARE SUGGESTION OF SUCH A RESULT, WITH ITS ATTENDANT INCONVENIENCES, GOES FAR TO SUSTAIN THE CONCLUSION WHICH WE HAVE REACHED, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-Federal purposes have been enacted and carried into effect.

"The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson,* 7 Wall. 347, 19 L. Ed. 62. We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justifi-

> cation for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.
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> * * * * * * *
>
> "If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department,—an authority which plainly we do not possess." (Emphasis added.)

Our case does not involve these considerations.

The total number of Alaska's residents is less than that of a large county. The total number of its territorial taxpayers would probably equal the number of taxpayers in a middle-class city. So we are talking about a relatively small group of taxpayers with a direct, immediate, well-defined, and substantial interest in the Territorial Treasury.

Neither the Alaskan Legislature nor Alaskan officials occupy the same relationship to the Federal Courts that Congress or the President occupy to the Supreme Court. The Organic Act was passed by a higher authority—Congress. The Federal Courts were established by a higher authority—Congress. Both are guardians against the excesses of territorial officials; and a taxpayer's suit in equity is the common, sound way of obtaining redress against such excesses. The situation in Alaska presents a need for taxpayer's suits similar to that of the cities, counties, states, District of Columbia, and other territories where such suits are universally recognized and allowed.

The lack of similarity in our case to the case of *Massachusetts v. Mellon* is brought into clear focus by the *Buscaglia* decision where the First Circuit states at 145 F. 2d 283-284:

> "The recognition of that right is needed more in Puerto Rico than in state communities. In the latter, the executive chief or the chiefs of departments, if they act ultra vires or without authorization from the Legislature and make illegal use of public funds, may be submitted to an 'impeachment' proceeding and punished for their illegal act. If in Puerto Rico, the legislature of which lacks authority to bring 'impeachment' proceedings and whose high executive officers do not derive their authority and power from the consent of the governed, we adopted the rule followed by a minority of the state jurisdictions and ignored the fact that the modern tendency is in the direction of acknowledging the right of the taxpayer to sue those who make illegal use of public funds,

we would have to admit that in this jurisdiction the illegal act of making unauthorized use of public funds could be committed without there existing an efficient remedy to avoid or punish the same. We would have to confess that in Puerto Rico the legal maxim ubi jus, ibi remedium has no meaning.

The court below therefore held 'that petitioner taxpayer has the necessary standing and interest to bring this injunction proceeding.' We are asked to reverse this holding on two grounds: First because it is patently erroneous, and second because the question is not a local but a federal one controlled by the decision of the Supreme Court in *Commonwealth of Massachusetts v. Mellon,* supra. WE DO NOT AGREE."

* * * * * * *

"In *Commonwealth of Massachusetts v. Mellon,* the Supreme Court decided as a question of first impression that a federal taxpayer's interest in monies in the United States Treasury is shared with so many others, is so comparatively minute and indeterminable, 'and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.' [262 U.S. 447, 43 S. Ct. 601, 67 L. Ed. 1078] Then on grounds of public policy it reinforced its conclusion that a federal taxpayer, unlike a municipal one with respect to municipal funds, has no standing to seek an injunction against an alleged illegal expenditure of federal funds, and then said that when no justiciable controversy was before it, the doctrine of separation of powers prevented it from interfer-

ing with the action of executive officials on the ground that the statutes under which they were acting were unconstitutional. It said: 'We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional.' The language of the court in *Commonwealth of Massachusetts v. Mellon* was directed to a case involving the relation of an individual taxpayer to the Federal Government. The interest of such an individual, as affected by an alleged illegal expenditure of federal funds, was regarded as so minute, indeterminable, and remote, as not to present any substantial case or controversy in the constitutional sense between the plaintiff and the Secretary of the Treasury. BUT THE RELATION OF A TAXPAYER TO THE GOVERNMENT OF PUERTO RICO IS, AS A MATTER OF DEGREE, NOT SO ATTENUATED; and despite any purely logical arguments which might be made from some of the language in *Commonwealth of Massachusetts v. Mellon,* we have no doubt that it is within the competence of the territorial government, either by legislative act or judicial decision, to authorize a taxpayer's bill in equity in a case like the present without trenching upon the doctrine of separation of powers implicit in the Organic Act." (Emphasis ours.)

In discussing the right of taxpayers to sue state officials, the following additional light is cast in 52 *Am. Jur.* Taxpayers' Actions, page 5.

> "[T]he real basis of the rule permitting suit by the individual taxpayer is the necessity of prompt action to prevent irremediable public injury; this

reason applies equally as well where STATE funds are being misappropriated, and if jurisdiction can be sustained in one case it should be in the other, JUST AS THE MAJORITY OF COURTS HOLD THAT IT CAN BE. The municipal or county taxpayer is allowed to maintain the suit, not because of an individual interest differing from other taxpayers, but because, as such taxpayer, he is so interested in the municipal funds that he may ask the court to protect them from misuse or misappropriation; the taxpayer bears the same relation to the STATE funds as to the MUNICIPAL funds, except in degree, a point which should not enter into the question. In other words, it is the pecuniary interest of the taxpayer that gives him the right to sue, not the character of the officer whom he seeks to restrain, and not necessarily the supposed analogy which his position as a municipal taxpayer bears to that of a stockholder in a private corporation. This latter view, it is submitted, merely furnishes a theoretical basis for a rule which, without such theoretical basis, runs somewhat contrary to the general understanding of the principles of equity with respect to who may maintain injunction; but it seems better to treat the rule with respect to taxpayers' actions AS AN EXCEPTION TO THE GENERAL EQUITY PRINCIPLES, FOUNDED ON THE NECESSITIES OF THE CASE, THAN TO ATTEMPT TO PLACE IT UPON A LOGICAL, THEORETICAL BASIS." (Emphasis added.)

We say that the Court below has misapplied the rule of *Massachusetts v. Mellon* by trying to draw

an analogy between federal taxpayers who number in the tens of millions and Alaskan taxpayers who number less than one hundred thousand. In Alaska, the same pressing reasons for giving taxpayers assistance exists as in the case of city, county and state taxpayers. And the compelling policy considerations against suits by United States taxpayers—resting on principles of limiting federal jurisdiction and maintaining Federal Separation of Powers—simply do not exist in the case of Territorial District Courts.

The fact that *Massachusetts v. Mellon* is frequently cited for the proposition that a plaintiff does not present a justiciable controversy if he does not suffer an injury different from the general public certainly does not justify the conclusion that the case bars taxpayer suits. The case specifically points out that taxpayer suits—other than those by United States taxpayers—have long been upheld in all Courts.

In short, when *tax-derived* public funds are being spent, a *taxpayer*—other than a United States taxpayer—does have a direct, substantial and immediate pecuniary interest in the tax funds being expended. His interest, being substantial and pecuniary, is obviously different from that of the general public. And in our case the taxpayer plaintiff is speaking for himself and those similarly situated.

G. In summary, plaintiff and those similarly situated have shown that they are taxpayers who have a direct, immediate, and substantial pecuniary interest in the tax-derived territorial funds being expended. On the authority of the territorial, state, county, and city taxpayer cases, they should be allowed to sue. Both the case of Massachusetts v. Mellon and the Ninth Circuit decisions comprehend just such a suit as this.

The trend of modern state Court decisions is certainly to allow any taxpayer to sue to prevent unlawful diversion of public funds—city, county or state. See 18 *McQuillin, Municipal Corporations,* (3rd Ed) §52.04, and *Aiken v. Armistead,* 198 S.E. 237, 246.

The situation in the Territory of Alaska—as to number of taxpayers, the need for allowing taxpayer suits, and the status of Territorial officials—is certainly no different than that in our cities and counties where taxpayer suits are universally allowed. It is little different than that in our states where the overwhelming majority of Courts permit taxpayer suits. But the situation is entirely different than that involving the hundred million taxpayers of the United States Government who, for entirely different policy reasons, are not allowed to use the separate and co-ordinate Judicial Branch to challenge the constitutionality of Congressional appropriations.

Plaintiff therefore sincerely urges that this Court follow the lead of the cases allowing such suits in other territories, that it follow the great weight of authority in the state Courts, and that it follow, as well, the principle enunciated in its own decision of *Valentine v. Robertson,* 300 Fed. 521. It should rule that a Territorial taxpayer may sue on behalf of himself and those similarly situated to restrain an unlawful or unconstitutional expenditure of Territorial funds.

II. THE ONLY JUSTIFICATION FOR ALLOWING ATTORNEY'S FEES IS BY WAY OF INDEMNIFICATION FOR COSTS. DEFENDANTS MADE NO SHOWING THAT THEY HAD PAID OR WOULD BE REQUIRED TO PAY THE ATTORNEY GENERAL ANY COMPENSATION FOR LEGAL SERVICES. THE DISTRICT COURT THEREFORE HAD NO AUTHORITY TO MAKE SUCH AN AWARD.

Section 55-11-51 ACLA 1949 provides:

> "*Compensation of Attorneys.* The measure and mode of compensation of attorneys shall be left to the agreement, express or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums *by way of indemnity* for his attorney fees in maintaining the action or defense thereto, *which allowances are termed costs.*" (Emphasis ours.)

Rule 54 (d), Federal Rules of Civil Procedure provides:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

The allowance of attorney fees as costs is within the discretion of the Court. *Alameda, et al., v. Paraffine Companies,* 169 F. 2d 408, 409 (9th Cir., 1948.)

In this case, the Territory of Alaska is not a party. The Attorney General, who represents the defendants, is a salaried official of the Territory. The defendants sought to be restrained are all salaried officials of the Territory. They have incurred no expense whatsoever in their defense of this action.

The Alaskan statute (55-11-51) provides for an attorney's fee "by way of *indemnity* in maintaining the

action or defense thereto," which allowance is termed a cost. This precludes an attorney's fee where there is nothing to indemnify. As we have heretofore pointed out, the Territory of Alaska, which pays the salary of the Attorney General and, for that matter, of all the defendants, is *not a party.*

Who is the party to be *indemnified?* Certainly not the Territory of Alaska which is not a party; certainly not the defendants who have incurred no expense in the action; and certainly not the salaried Attorney General. The trial Court, therefore, erred prejudicially in requiring plaintiff to pay an attorney's fee to an unspecified "defendant" (Tr. 25) who incurred no expense.

III. PLAINTIFF'S COMPLAINT STATES A CLAIM FOR INJUNCTIVE RELIEF ON THE GROUND THAT NON-PUBLIC SCHOOLS THAT EXIST PRIMARILY FOR A NON-PUBLIC PURPOSE, NAMELY, TO TEACH SECTARIAN AND DENOMINATIONAL DOCTRINE, WILL BE DIRECTLY SUPPORTED AND MATERIALLY BENEFITED BY THE CHALLENGED LEGISLATION. THE DISTRICT COURT ERRED IN NOT PASSING ON THE CONSTITUTIONAL QUESTIONS, IN NOT FINDING THAT A CLAIM FOR RELIEF WAS STATED, AND IN DISMISSING THE COMPLAINT.

Plaintiff set forth ample facts to establish a justiciable controversy and his standing to sue as a taxpayer. The District Court therefore erred in not passing on the merits of the complaint and in not finding that a claim for relief was stated. It therefore erred as well in not denying the motion to dismiss the complaint.

A. The Organic Act expressly forbids the appropriation of public money for the support or benefit of sectarian schools. Plaintiff alleged that public money will go directly to subsidize, support, and benefit non-public sectarian schools by supplying their transportation needs at public expense. There are many recent decisions squarely holding such legislation unconstitutional under state constitutional provisions almost identical to those of the Organic Act.

The Organic Act of the Territory of Alaska and, in particular, Section 77 of Title 48 of the United States Code provides in part as follows:

> ". . . nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school or any school not under the exclusive control of the Government . . ."

It is, of course, clear that the Alaska Legislature may not contravene the Organic Act. *Alaska Fish Salting & By Products Co. v. Smith,* 255 U.S. 44, 65 L. Ed. 489.

It is equally clear from the provision quoted above that the Organic Act prohibits any appropriations of territorial funds for either the support or the benefit of any sectarian or denominational or other non-public school.

Since plaintiff alleged that appropriations of territorial funds have been made and will be expended for transportation of pupils to sectarian and denominational schools, the simple question here is:

> *Does an appropriation of territorial funds for the transportation of pupils to sectarian schools either support or benefit such schools?*

If so, for this conclusive reason, plaintiff's complaint should not have been dismissed.

Plaintiff contends that appropriations providing for transportation of parochial school pupils at public expense obviously support and benefit the schools in question.

It is no secret that sectarian schools seek to draw pupils away from our public schools. It is the aim of sectarian schools to fuse and combine secular and religious education. In fact, church law often forbids attendance at public schools and requires enrollment in church conducted schools. Thus sectarian schools compete with the public schools. The public schools are provided by the state and are open to all on equal terms and are proscribed from sectarian teaching. There is therefore a vast difference between the sectarian purpose of a sectarian school and the public purpose of a public school. See 67 S. Ct. 504, 514-515.

A major impediment to the success of this sectarian competition is lack of transportation.

If a potential pupil of a particular sect lives at a point quite distant from the church conducted school, he is, of course, far more likely to go to the public school to which free transportation is provided. Similarly, if the church conducted school is located at a point distant from a particular population area, the potential pupil is more apt to attend the public school located nearby. It is therefore obvious that transportation supplies the vital factor necessary to the successful location, existence, growth and *competition* of

the sectarian school. Transportation is therefore a vital, and not incidental, aid and benefit and support for sectarian schools.

Transportation *at public expense* is an extremely valuable benefit. It facilitates attendance. It encourages the pupil to avail himself of sectarian schools. It saves the church the money it would normally expend for such purpose. And it makes such funds available for other sectarian purposes. The support and benefit is therefore clearly and directly *financial.*

Hence, appropriations for transportation violate the "no support or benefit" provisions of the Organic Act. And Courts which have been asked to rule upon the constitutionality of such appropriations in the face of similar constitutional prohibitions have overwhelmingly struck down the appropriations as violating the letter of the constitution and the principle of separation of church and state embodied therein.

A very recent authority is *Visser v. Nooksack Valley School Dist. No. 506,* 33 Wash. 2d 699, 207 P. 2d 198. There plaintiff brought a mandamus proceeding to compel public officials to allow sectarian school pupils to use public school transportation facilities. *A taxpayer intervened successfully to resist.* The Washington statute directed that public transportation be provided to sectarian school pupils. But Article I, Section 11 of the Washington Constitution provided:

> "No public money or property shall be appropriated for or applied to any religious worship, ex-

ercise or instruction, or the support of any religious establishment."

The Court therefore pointed out at 207 P. 2d 198, page 201, that "The Police power—broad and comprehensive as it is—cannot be exercised in contravention of plain and unambiguous constitutional inhibition". And in striking down the transportation statute, the Court had this to say at 207 P. 2d 198, 203:

> "The question of constitutionality of the statute thus resolves itself to this: Does school bus transportation to or from religious, or sectarian, schools constitute support or maintenance of such schools?
>
> "Transportation to or from school differs, in both degree and nature, from those indirect, incipient and incidental benefits which accrue to schools, as buildings, or to its pupils, as citizens, under normal health, welfare, and safety laws of the state. In both inception and operation of schools, transportation thereto and therefrom is a vital and continuous financial consideration. Any private, religious, or sectarian schools which are founded upon, or fostered by, assurances that free public transportation facilities will be made available to the prospective pupils thereof, occupy the position of receiving, or expecting to receive, a direct, substantial, and continuing public subsidy to the schools, *as such,* thus encouraging their construction and maintenance, and enhancing their attendance, at public expense.
>
> "The following paragraph, taken from *Judd v. Board of Education,* 278 N.Y. 200, 211, 15 N.E. 2d 576, 118 A.L.R. 789, as quoted with approval

in the Mitchell case (*Mitchell v. Consolidated School District No. 201,* reported in 17 Wash. 2d 61, 135 P. 2d 79, 146 A.L.R. 612) expresses our view with reference to the case at bar: 'The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law, but rather, is in aid of their pupils. That argument is utterly without substance. * * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. "It helps build up, strengthen and make successful the schools as organizations" [citing cases]. Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. In the instant case, $3,350 was appropriated out of public moneys solely for the transportation of the relativity few pupils attending the specific school in question. If the cardinal rule that written constitutions are to receive uniform and unvarying interpretation and practical construction is to be followed, in view of interpretation in analogous cases, it cannot successfully be maintained that the furnishing of transportation to the private or parochial school out of public money is not in aid or support of the school.'

"Our answer to the question above propounded may well be couched in the language used in the majority opinion in the *Mitchell* case, supra:

> 'We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself. That pupils and parents may also derive benefit from it, is beside the question.' "

See also *Gurney v. Ferguson,* 190 Okl. 254, 122 P. 2d 1002, *Cer. Den.* 317 U.S. 588; *Judd v. Board of Education,* 278 N.Y. 200, 15 N.E. 2d 576; *State ex rel. Traub v. Brown,* 6 W.W. Harr., 36 Del. 181, 172 Atl. 835, *writ of error dismissed,* 197 Atl. 478; *Berghorn v. Reorganized School Dist.,* 260 S.W. 2d 573 (Missouri); *McVey v. Hawkins,* 258 S.W. 2d 927 (Missouri); and *State v. Milquet,* 180 Wis. 109, 192 N.W. 392.

From the foregoing cases, it can be seen that while the Federal Constitution prohibits a "law respecting an establishment of religion," most state constitutions and organic acts go, and were intended to go, much farther. As is said in an excellent note in 33 *Cornell Law Quarterly* 122 at page 124:

> "Several state constitutions forbid an establishment of religion in terms similar to those of the First Amendment; *most have more specific provisions against the use of public money in support of, or the compulsory support of, religious sects or institutions, the appropriation of funds for sectarian schools,* or the giving of any preference to one sect over others."

See also II *Cooley's Constitutional Limitations* 966.

Historically, the First Amendment grew out of the keen desire of our people to end the church-state unity

and the oppressive church practices that prevailed in the colonies. But it antedated a new problem in the field of church-state separation which grew out of the rise of the non-sectarian public school system. For with the origin, growth and development of the public school system certain churches sought more and more to obtain public funds and support for the competitive, sectarian school system. See *Illinois Ex Rel. McCollum v. Board of Education,* 333 U. S. 203, 214. These efforts are described as follows in the *Everson* case, 330 U.S. 1, 63:

> "Two drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. *The other, to obtain public funds for the aid and support of various private religious schools.*" (Emphasis ours.)

The sectarian drives for public funds to support the competitive, sectarian school system have been on the state and territorial level. It is, therefore, not surprising to find that our state constitutions and territorial organic acts have been far more specific than the First Amendment in dealing with the problem of sectarian school support. As certain churches have increased their demands for public subsidies in the field of sectarian education, so also have state and territorial organic provisions become stronger and more explicit in their prohibitions. They have recognized the threats to the church-state American doc-

trine. As was said in the *McCollum* case, 333 U.S. 203, 214:

> "*The upshot of these controversies,* often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, *the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.*
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> * * * * * * *
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> "So strong was this conviction, that rather than rest on the comprehensive prohibitions of the First and Fourteenth Amendments, President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition against the use of public funds for sectarian education, *such as had been written into many state constitutions.*
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> * * * * * * *
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> "The extent to which this principle was deemed a presupposition of our constitutional system *is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.'* " (Emphasis ours.)

Our point is that the words of the Alaska Organic Act—strongly and comprehensively prohibiting any *support or benefit*—were intended to resist and restrain *any and all* methods by which sectarian education would receive public funds or public support. The pervasive language of the Alaska Organic Act, like

that in many other state constitutions, was inserted because of a firm resolve of our people that they would never be required to be taxed for, contribute to, give aid to, confer benefit upon, or otherwise support sectarian education or sectarian schools.

Dealing with such language found in the Alaska Organic Act, the state courts, therefore, have held that the prohibition means just what it says—*no support.* No support by outright payment. No support by providing buildings. No support by transferring property. No support by paying tuitions. *And no support by providing transportation.*

Publicly supported sectarian school transportation is obviously one of the supports that the Organic Act was intended to prevent. It is precisely what it should prevent. Sectarian education, sectarian buildings, sectarian property, and sectarian transportation are all one program. One is the "camels foot in the tent" to the other. If a particular sect commands that its devotees attend the schools of that sect, rather than the state provided public schools which ban sectarian teaching, then that sectarian educational program must be at private expense. Public schools and the means of access thereto are free and open to all on equal terms and are provided at public expense for the express purpose of promoting and expanding our public school system. As was pointed out in the *McCollum* case, 333 U.S. 203, 231:

> "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."

Competitive, sectarian schools, that teach subjects proscribed to the public schools, and the means of access to such competitive sectarian schools, were never intended to be promoted or expanded at public expense. Such promotion and expansion is expressly prohibited in word and in principle by Section 77 of the Organic Act.

Plaintiff therefore clearly stated a cause of action to restrain these expenditures for the support of sectarian schools.

B. Plaintiff has also stated a claim for relief under the Federal Constitution and under other provisions of the Organic Act.

Plaintiff alleged that an unlawful and unconstitutional diversion of public funds is involved here for the further reasons: (1) that a law appropriating money for sectarian school transportation grants a preference to, aids, and supports sectarian and denominational schools and therefore constitutes a law respecting an establishment of religion; (2) that such a law compels plaintiff and those similarly situated to be taxed for the support, aid, and assistance of sectarian education and therefore deprives them of due process of law by taxing them for an unconstitutional and non-public purpose; and (3) that such a law is unequal, class legislation, and non-uniform in that one particular sect of which plaintiff and those similarly situated is not a member will receive a grossly disproportionate benefit therefrom in terms of both the pupils and the schools accommodated.

Such allegations squarely raise issues of unconstitutionality under: (1) The First Amendment pro-

hibiting laws respecting an establishment of religion; (2) The Fifth Amendment prohibiting deprivation of due process; (3) The Fourteenth Amendment prohibiting denial of due process and equal protection; (4) The Civil Rights Act (Sections 1981, 1982, 1983 of Title 42 U.S.C.A.) protecting against such intrusions; (5) Section 23 of Title 48 of the United States Code making these provisions applicable to the Territory of Alaska; and (6) Section 77 of Title 48 of the United States Code prohibiting non-uniform laws and class legislation.

As is shown in *Alaska Steamship Co. v. Mullaney,* 180 F. 2d 805, 817 (9th Cir., 1950), the limitations in the Federal Constitution are either directly applicable to acts of the territorial legislatures or, in any event, are made applicable by 48 U.S.C., Section 23. And as previously stated, the Legislature, of course, cannot contravene the Organic Act.

An appropriation of money for transportation of pupils to sectarian schools clearly breaches the vital principle of separation of church and state embodied in the First Amendment of the United States Constitution. Despite *Everson v. Board of Education,* 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, a split 5-4 decision, the very language used by the majority in that case and in *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, plus the convincing language of the four dissenting judges, plus the recent manifestations of the sectarian school drive for public funds, convince that a contrary result would be reached if the matter were presented today.

Recall the pervasive declaration by the *majority* judges in the *Everson* case at 330 U.S. 15-16:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups, and vice versa. *In the words of Jefferson, the clause against establishment of religion by laws was intended to erect 'a wall of separation between Church and State.'* "

The following analysis in an excellent law review article in 45 *Mich. L. Rev.* 1001, 1017 gives strength to the belief that the Supreme Court today would recognize that transportation appropriations do constitute aid within the meaning of the Federal establishment of religion clause:

> "The minority justices took issue both broadly and specifically with this treatment of the problem. The fundamental objection was that the pub-

lic welfare concept was completely inappropriate to a determination of the 'establishment of religion' question. Justice Rutledge stated the proposition in this way:

> 'Our constitutional policy * * * does not deny the value or necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself.'

"Thus, whenever legislation in fact aids or promotes religious teaching or observances, it falls within the area forbidden by the 'establishment of religion' clause, notwithstanding that it might be sustained under the Fourteenth Amendment if the religious element were absent.

"The specific issues drawn by the minority justices substantiate their basic critique. Transportation is an essential cost of modern education; once the public welfare analysis is permitted, the way is opened for additional assistance, tendered perhaps to the individual, but in fact aiding the school. 'Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings,

equipment and necessary materials. Nor is it any less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve.'

"Neither does the public safety argument of the majority stand up under the scrutiny of the minority. As has already been observed, the statute and resolution lack the essential elements of safety legislation, since they did not alter the pre-existing mode of transportation. Moreover, as Justice Jackson pointed out, the Court's analogy to police and fire protection is invalidated by the religious test which determined whether reimbursement for transportation was to be made.

"The suggestion of the majority that failure to include parochial schools in the transportation plan would amount to discrimination against them was met by the argument that such discrimination is in fact required by the First Amendment as the price of religious freedom. Indeed an arrangement which provided for the transportation of all school children and thus satisfied the equal protection argument discussed earlier herein would still be invalid to the extent that it authorized aid to parochial schools. 'For then the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no

creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of "contributions of money for the propagation of opinions which he disbelieves" that the fathers outlawed.'

"Summing up the division between the majority and minority on the 'establishment of religion' question, it seems to the writer that substantial and persuasive arguments support the minority position. No argument advanced by the majority meets the fundamental objection that legislation which in fact aids religion or religious institutions, directly or indirectly, is an establishment of religion. The public welfare argument, introduced in connection with the non-religious due process question, served but to obscure the underlying issues so clearly pointed out by Justice Rutledge. Further, discrimination against religious institutions in the gratuitous distribution of public funds is commanded by the Constitution. And, solidly supporting the minority's insistence on a broad interpretation of the 'establishment of religion' clause, is the proposition that in cases involving the fundamental freedoms of the First Amendment the usual presumption of constitutionality is unavailing to save even the least infringement upon them."

That this viewpoint of the minority is likely to be adopted is further sustained by the persuasive discussion in *Visser v. Nooksack Valley School Dist.,* 33 Wash. 2d 699, 207 P. 2d 199, 204-205:

"Appellants have placed great reliance on the principles announced in *Everson v. Board of Ed-*

ucation, 330 U.S. 1, 67 S. Ct. 504, 507, 91 L. Ed. 711, 168 A.L.R. 1392, which was a five-to-four decision. While that case holds, on its facts, that the incidental furnishing of free public transportation to parochial schools is not an 'establishment of religion,' within the prohibition of the First Amendment to the United States Constitution, nevertheless the right of the individual states to limit such public transportation to children attending the public schools is carefully preserved. Touching that question, the Supreme Court, in the majority opinion, said: 'While *we do not mean to intimate that a state could not provide transportation only to children attending public schools,* we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.' (Italics ours.)"

"Our own state constitution provides that no public money or property shall be used in support of institutions wherein the tenets of a particular religion are taught. Although the decisions of the United States Supreme Court are entitled to the highest consideration as they bear on related questions before this court, we must, in light of the clear provisions of our state constitution and our decisions thereunder, respectfully disagree with those portions of the Everson majority opinion which might be construed in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools, is not *in support* of such schools. While

the degree of support necessary to constitute an establishment of religion under the First Amendment to the Federal Constitution is foreclosed from consideration by reason of the decision in the Everson case, supra, we are constrained to hold that the Washington constitution although based upon the same precepts, is a clear denial of the rights herein asserted by appellants.

"Speaking from the viewpoint of Art. I, §11, and Art. IX, §4, of our constitution, we are in full accord with the following pronouncement made by Mr. Justice Rutledge in his dissenting opinion in the Everson case, supra: 'By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome and [sic] Amendment's bar. Nor may the courts sustain their attempts to do so by finding such consequences for appropriations which in fact give aid to or promote religious uses. [Citing cases.] Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small. No such finding has been or could be made in this case. The amendment has removed this form of promoting the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair.' "

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed with instructions to deny defendant's motion to dismiss, with costs to plaintiff.

Dated August 17, 1956.

Respectfully submitted,

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